

- -
State of Wisconsin

RECEIVED

DEPARTMENT OF COMMERCE

MAY 09 2001

In the matter of:

ERS DIVISION

The Claim for Reimbursement Pursuant
To the Provisions of the PECFA Program

By:
Eugene Wagner
Feldner Chevrolet and Marine
Appellant,

vs. Hearing Number 00-737
PECFA CLAIM #53079-9998-01

Secretary,
Wisconsin Department of Commerce
Respondent

FINAL DECISION

Notice of Rights

Attached are the Findings of Fact, Conclusions of Law, and Order in the above matter. This is a **FINAL DECISION.**

Any party aggrieved by the decision may request a rehearing pursuant to Wis. Stat. § 227.49 within 20 days of the date of this decision by sending a petition to Dennis Kozich, Chief Counsel Department of Commerce, P.O. Box 7970, Madison, WI 53707-7970. A petition for judicial review must be filed no more than 30 days after the date of this decision or the date of a decision on a request for a rehearing, if any, pursuant to Wis. Stat. § 227.53. The petition for judicial review must be served on the Department of Commerce, Office of the Secretary, 123 W. Washington Avenue, 6th Floor, P.O. Box 7970, Madison, WI 53707-7970.

STATE HEARING OFFICER:
RONALD I. WEISBROD

DATED AND MAILED
MAY 8, 2001

MAILED TO:
Appellant Agent or Attorney

Department of Commerce

Eugene Wagner
Feldner Chevrolet Inc.
1201 Main St
St. Cloud, WI 53079

Kristiane Randal
Assistant Legal Counsel
P.O. Box 7970
Madison, WI 53707-7970

FINDINGS OF FACT

When the appellant submitted its claim for reimbursement of the costs it incurred in the remediation of the petroleum-contaminated site in question, it included a letter, dated October 21, 1998, from a representative of its environmental consultant to a representative of the Wisconsin Department of Natural Resources (DNR). The letter requested approval from the DNR to perform laboratory testing of groundwater to monitor for the presence of Volatile Organic Compounds. The letter included the DNR representative's concurrence, dated November 2, 1998, "that VOC testing after the investigative phase of the project will be required."

Invoices submitted for reimbursement show that the VOC laboratory testing was performed before November 2, 1998.

On May 19, 2000, the Wisconsin Department of Commerce (department), which was responsible for administering the PECFA program, issued a PECFA Award Summary to the appellant providing a breakdown on PECFA costs being reimbursed for the cleanup of its site located at 1201 Main St., St Cloud, Wisconsin. The decision denied reimbursement in the amount of \$4363.58, of which \$4164.58 was due to VOC testing costs having been incurred prior to any DNR concurrence. By letter dated June 30, 2000, the appellant appealed the denial in the amount "of \$4334.58, (plus interest)" on July 6, 2000.

On August 14, 2000, the department filed a motion to dismiss the appeal on the basis that the expenditure in contention was not eligible for reimbursement. The appellant submitted a reply to that motion.

APPLICABLE STATUTES AND CODE PROVISIONS

Wisconsin Stat. § 101.143(3)(f) provides, in part, as follows:

Application. A claimant shall submit a claim on a form provided by the department. The claim shall contain all of the following documentation of activities, plans and expenditures associated with the eligible costs incurred because of a petroleum products discharge from a petroleum product storage system:

3. Contracts for eligible costs incurred because of the discharge and records of the contract negotiations.

Wisconsin Stats. § 101.143(4)(c) provides, in part, as follows:

Exclusions from eligible costs. Eligible costs for an award under par. (a) do not include the following:

3. Other costs that the department determines to be associated with, but not integral to, the eligible costs incurred because of a petroleum products discharge from a petroleum product storage system or home oil tank system.

Wisconsin Admin. Code ILHR § 47.12(1), effective March 1, 1994, provides, in part, as follows:

APPLICATION. A claimant shall submit a claim on a Remedial Action Fund Application Form (SBD-8069) furnished by the department, and shall include the following:

(c) A DNR Site Investigation and Remediation Plan Review form (SBD-8069) with the approval of the DNR for conduct of the site investigation and development of the remedial action plan, remediation, long-term monitoring, operation and maintenance or other milestone established under this chapter;

Wisconsin Admin. Code ILHR § 47.30(2) provides, in part, as follows:

EXCLUSIONS FROM ELIGIBLE COSTS. The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats., lists specific cost items which may not be reimbursable under the PECFA program. In order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

(c) Costs for testing or sampling unrelated to the investigation for the extent of contamination under the scope of this chapter:

3. Costs associated with full VOC testing after the investigation phase, unless required by the DNR for monitoring PECFA eligible products and the DNR letter documenting the requirement is submitted with the claim.

Wisconsin Admin. Code ILHR § 47.33(3)(b), provides, in part, as follows:

Commodity purchases. 1. All commodity services which include, but are not limited to, soil borings, monitoring well construction, laboratory analysis, excavation and

trucking shall be obtained through a competitive bid process.

DISCUSSION

The appellant contended that the department should have reimbursed it for the cost of performing VOC testing, in the amount of \$4334.58, plus interest, on the basis that as stated in the letter, the testing was required by the Department of Natural Resources, and that letter had been submitted with the appellant's claim. The appellant's contention cannot be sustained.

The agencies charged with the responsibility of administering the PECFA program have consistently interpreted the law to require approval before work is performed. The letter submitted by the appellant with its claim for reimbursement does not meet the requirements of the law. That letter documents that the appellant did not obtain DNR approval before performing the testing. The laboratory testing was conducted before the appellant's environmental consultant requested DNR approval. Moreover, as the department points out, the letter submitted was not a directive from the DNR to perform such VOC monitoring as is required by the PECFA law.

CONCLUSIONS OF LAW

The State Hearing Officer therefore finds that the appellant has failed to establish that it was eligible for reimbursement of its costs in performing VOC monitoring after the investigation phase of the project, within the meaning of Wis. Stat. Ch. 101 and Wis. Admin Code ILHR Ch. 47.

DECISION

The Department of Commerce's Motion to Dismiss is granted. The appeal filed on July 6, 2000, requesting a hearing regarding the PECFA award on the Feldner Chevrolet and Marine remediation site, located at 1201 North Main St., St Cloud, Wisconsin, is dismissed.

STATE HEARING OFFICER

Ronald I. Weisbrod
Administrative Law Judge